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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SCOTT BRIAN GARCIA, Defendant and Appellant.	B284953 (Los Angeles County Super. Ct. No. NA106373)

APPEAL from a judgment of the Superior Court of Los Angeles County, James D. Otto, Judge. Judgment of conviction affirmed; remanded for further proceedings.

Jerome McGuire, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Scott Brian Garcia appeals his conviction for first degree burglary. Garcia argues the evidence was insufficient to support the verdict, and his motion for acquittal under Penal Code section 1118.1[1] should have been granted, because the People failed to establish the elements of entry and intent. We affirm the judgment of conviction, but remand to allow the trial court to correct a sentencing error.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

In May 2017, Ana Torres lived in a home located on East 65th Street in Long Beach with her family. Appellant Garcia lived next door.

Torres's house had an unfenced front yard. A living room window and a bedroom window, as well as the front door, faced out into the yard. Both windows had the same basic design. They consisted of two glass panes—a lower, interior pane that slid up and down within the frame, and an upper, exterior pane that stayed fixed within the frame. A screen could be placed in tracks embedded within the frame, and, if so affixed, sat just outside the lower, interior pane. There was a space of approximately one and one-half inch between the outer window and the inner glass pane.

Torres had installed a window air conditioning unit in the living room window, and the interior window pane was lowered to the point where it met the air conditioner. Because the air conditioner blocked the tracks where the screen would otherwise be inserted, Torres placed the screen on top of the air conditioner,

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[1] All further undesignated statutory references are to the Penal Code.

leaning up against the window. The bedroom window did not have an air conditioning unit, and the screen was affixed in its tracks. Torres's television set could be seen through one of the front windows. Torres's mailbox was set into the residence's front wall, a few feet from the air conditioner. Both the postal carrier and Torres's gardener had access to the area around the living room window.

On the morning of May 4, 2017, Torres was alone in the house. At approximately 8:30 a.m., she saw Garcia trying to open her living room window. He moved the screen and then tried to pull the window up. Garcia's hands were touching the lower, interior window pane above the air conditioner. Garcia next moved to Torres's front door, and attempted to force it open. He yanked at the doorknob so forcefully that he caused the door to shake. Garcia then moved to the bedroom window and tried to pull the screen off. Torres thought Garcia had something in his hands, but she could not see what it was.

Torres called the police as soon as she saw Garcia trying to open the living room window. Approximately fifteen minutes later, Officer Randy Mohagen of the City of Long Beach Police Department responded to the call. Mohagen saw Garcia walking west on East 65th Street, two houses away from Torres's house. Garcia threw a small object into the grass in front of a house. Mohagen searched the area and recovered a small screwdriver with a broken handle.

After the incident, Torres found the screen that had been leaning against the living room window on the ground, to the side of the window. A photograph of the bedroom window, taken after the incident, showed a small, curved opening between the frame and window screen, and the screen was slightly bent outward.

Torres had checked the window screens every week, but had not previously noticed the opening or the damage to the screen.

The defense presented no evidence.

2. *Procedure*

A jury convicted Garcia of first degree burglary (§ 459), and found that a person, other than an accomplice, was present in the residence during the commission of the offense. In a bifurcated proceeding, the jury further found Garcia had suffered seven prior prison terms within the meaning of section 667.5, subdivision (b). The trial court sentenced Garcia to ten years' imprisonment, comprised of the upper term of six years for the burglary, plus four one-year section 667.5, subdivision (b) enhancements. It imposed a restitution fine, a suspended parole revocation restitution fine, a court operations assessment, and a criminal conviction assessment, and ordered Garcia to pay restitution to the victim in an amount to be determined at a subsequent hearing.

Garcia timely appealed.

DISCUSSION

1. *Sufficiency of the evidence*

After the prosecution rested its case at trial, Garcia moved for judgment of acquittal under section 1118.1, arguing that the People had failed to prove he made entry into the house. The trial court denied Garcia's motion. Garcia contends his section 1118.1 motion should have been granted, and the evidence was insufficient to support the verdict, for two reasons: first, neither his removal of the window screen from the living room window, nor his prying of the screen on the bedroom window, amounted to an entry of the residence; and second, the evidence was insufficient to establish he had the requisite intent, that is, he

intended to commit larceny or a felony inside the house. Accordingly, he argues, his conviction must be reversed, or at least reduced to attempted burglary. We disagree.

a. *Applicable legal principles*

We review both the denial of a motion for judgment of acquittal under section 1118.1 and the sufficiency of the evidence to sustain a conviction for substantial evidence. (See *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1182–1183, overruled on another ground by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Stevens* (2007) 41 Cal.4th 182, 200.) We " ' "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" ' " (*People v. Salazar* (2016) 63 Cal.4th 214, 242.) "We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 919.) We will only reverse if " ' "upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; *People v. Bolin* (1998) 18 Cal.4th 297, 331.) The standard is the same when the People rely primarily upon circumstantial evidence. (*People v. Salazar*, at p. 242.)

A person is guilty of burglary if he or she "enters any house . . . with [the] intent to commit grand or petit larceny or any felony . . . ." (§ 459; *People v. Goode* (2015) 243 Cal.App.4th 484, 489.) A burglary of an inhabited dwelling house is of the first degree. (§ 460, subd. (a); *People v. Valencia* (2002) 28 Cal.4th 1, 6

(*Valencia*), disapproved on another ground by *People v. Yarbrough* (2012) 54 Cal.4th 889, 894; *People v. Garcia* (2017) 17 Cal.App.5th 211, 223.) A burglary is complete upon the slightest partial entry of any kind, by the intruder or by an instrument used by the intruder. (*Magness v. Superior Court* (2012) 54 Cal.4th 270, 273 ["It has long been settled that the slightest entry by any part of the body or an instrument is sufficient"]; *Valencia*, at pp. 7–8, 13; *People v. Davis* (1998) 18 Cal.4th 712, 717 [burglary may be committed by using an instrument to enter a building, as, for example, using a tire iron to pry open a door or a tool to create a hole in a wall]; *People v. McEntire* (2016) 247 Cal.App.4th 484, 491.) A completed theft is not required. (*People v. Rocha* (2013) 221 Cal.App.4th 1385, 1401; *In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) Where a defendant opens a door, but no part of his or her body or an instrument crosses inside, the defendant has committed only an attempted burglary; for entry to occur, "something that is *outside* must go *inside* . . . ." (*Magness v. Superior Court*, at pp. 278–279.)

b. *The evidence was sufficient to prove entry*

Garcia argues that the evidence was insufficient to establish he effectuated entry, at either the living room or at the bedroom window.

(i) *The living room window*

The evidence showed that when Garcia arrived at Torres's residence, the living room window screen was balanced on top of the window air conditioner unit, leaning against the window. Garcia removed the screen from its place and set it on the ground. He then reached into the area behind where the screen had been, and unsuccessfully attempted to open the window.

Garcia avers that his act of removing and reaching behind the living room window screen did not amount to an entry, because the screen was simply leaning against the window, rather than set in its track. Both parties present the issue as one of sufficiency of the evidence. However, Garcia's contention—that reaching behind an unaffixed window screen does not constitute "entry" into a house within the meaning of the burglary statute—presents a question of law. "Whether penetration into the area behind a window screen amounts to an entry of a building within the meaning of the burglary statute is a question of law and not a question of fact." (*Valencia*, *supra*, 28 Cal.4th at p. 16; *People v. Thorn* (2009) 176 Cal.App.4th 255, 268 ["application of the reasonable belief test to determine whether penetration of a particular part of a building amounts to an entry for purposes of the burglary statute is a question of law for the court and not a question of fact for the jury"]; *People v. Garcia* (2017) 17 Cal.App.5th 211, 222–223.) We review questions of law de novo. (*People v. Grimes* (2016) 1 Cal.5th 698, 712; *People v. Harris* (2014) 224 Cal.App.4th 86, 89.)

In *Valencia*, our Supreme Court held that penetration into the area behind a window screen amounts to entry within the meaning of the burglary statute, even when the window itself is closed and is not penetrated. (*Valencia*, *supra*, 28 Cal.4th at pp. 3–4, 13, 15.) There, the defendant removed two screens, which were secured in their tracks in front of the victim's windows, but he was unable to open the windows themselves. (*Id.* at p. 4.) *Valencia* explained that, "[i]n most instances . . . the outer boundary of a building for purposes of burglary is self-evident," and includes a building's roof, walls, doors, and windows. (*Id.* at p. 11.) But where the building's outer boundary

is *not* self-evident, *Valencia* concluded a "reasonable belief test" applied. (*Ibid.*) Under that test, "a building's outer boundary includes any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization." (*Ibid.*)

Valencia reasoned that the burglary statute was designed to guard against entry that " 'violates the occupant's possessory interest in the building' " and that "threatens ' " 'the germination of a situation dangerous to personal safety.' " ' [Citation.]" (*Valencia*, *supra*, 28 Cal.4th at p. 13; see *People v. Gauze* (1975) 15 Cal.3d 709, 715.) Penetration into the area behind a window screen violates both these interests. (*Valencia*, at p. 13.) Indeed, a building's inhabitants are " 'just as likely to react violently to an intruder's penetration of their window screen as to the penetration of the window itself.' " (*Ibid.*) Thus, *Valencia* concluded that even the minimal entry into the area behind a window screen was the type of entry the burglary statute was intended to prevent. (*Id.* at pp. 12–13.) "Under the reasonable belief test . . . a window screen is clearly part of the outer boundary of a building for purposes of burglary. A reasonable person certainly would believe that a window screen enclosed an area into which a member of the general public could not pass without authorization." (*Id.* at p. 12.) Because "window screens . . . announce that intrusion is unauthorized," the court held that "penetration into the area behind a window screen amounts to an entry of a building within the meaning of the burglary statute . . . . " (*Id.* at pp. 12–13.)

Valencia rejected the notion that the test turned on whether the building element at issue provided physical protection against unauthorized entry. "[W]hat matters is not

whether a reasonable person would believe that a given element of a building provides some physical protection against unauthorized intrusion, but simply whether a reasonable person would believe that a member of the general public needed authorization to pass beyond it." (*Valencia*, *supra*, 28 Cal.4th at p. 12.) " '[E]ven an open door or window affords some expectation of protection from unauthorized intrusion because reasonable persons understand the social convention that portals may not be crossed without permission.' " (*Ibid.*; see *People v. Gauze*, *supra*, 15 Cal.3d at p. 713 [elimination of the common law element of " 'breaking' " from California's burglary statute means that "at a minimum . . . it no longer matters whether a person entering a house with larcenous or felonious intent does so through a closed door, an open door or a window"].)

More recently, *People v. McEntire* concluded the defendant made entry for purposes of the burglary statute when he attempted to open a sliding glass door, thereby penetrating the area behind a partially open screen door in the process. (*People v. McEntire*, *supra*, 247 Cal.App.4th at pp. 486, 492.) When the defendant entered the victim's backyard, the sliding screen on the sliding glass door was already open. The victim saw the defendant yank on the sliding glass door; she then fled from the residence and called 911. (*Id.* at pp. 487, 492.) Applying *Valencia*'s reasonable person test, *McEntire* concluded the defendant made entry while the victim was inside the home.[2]

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[2] There was no question one of the defendants eventually managed to enter the victim's home in *McEntire* by breaking the sliding glass door. However, the defendants were subject to a sentence enhancement if a nonparticipant in the crime was present in the residence during commission of the burglary.

(*Id.* at p. 492.) The court reasoned that a screen door encloses an area that a reasonable person would believe could not be passed by the general public without authorization. The defendant accomplished entry because his "hand penetrated the portal of the sliding screen door . . . ." (*Id.* at p. 492.) "[E]ven though the screen was partially open . . . the intruder penetrated the space beyond the screen in attempting to open the sliding glass door while the resident was still inside her home." (*Id.* at p. 486.) "A burglarious entry may occur when an intruder penetrates the space beyond a door or a window whether it is open or closed, because a reasonable person would understand such portals may not be crossed without permission from the owner. [Citation.] A reasonable person would also understand a window screen encloses an area into which a member of the public could not pass without authorization." (*Id.* at p. 493.) A contrary holding, *McEntire* reasoned, would contravene the general purposes of the burglary laws. (*Ibid.*)

Here, Garcia entered Torres's residence within the meaning of the burglary statute when he removed the unaffixed window screen that enclosed the living room window and then penetrated the area beyond the screen when he tried to open the window. The window screen formed the outer boundary of Torres's home in the sense that *Valencia* required. The screen was placed against the window, above the air conditioning unit. "[W]indow screens . . . announce that intrusion is unauthorized . . . ."

(*People v. McEntire*, *supra*, 247 Cal.App.4th at p. 491.) Therefore, the question before the court was whether the defendant's act of penetrating the area beyond the sliding door screen, carried out when the victim was inside the home, constituted entry. (*Ibid.*)

(*Valencia*, *supra*, 28 Cal.4th at p. 12.) Garcia fails to explain why the same message would not be communicated by a window screen when it is located in virtually the same place relative to the window as an affixed window screen, but is not in its tracks. A reasonable person would believe that he or she could not move the screen and penetrate the area beyond it without authorization.

Further, the *Valencia* court's analysis of the interests implicated by penetration of a window screen is equally applicable here. An occupant's "possessory interest" is no greater in the area behind an affixed window screen than in the area behind an unaffixed window screen. (See *Valencia*, *supra*, 28 Cal.4th at p. 13.) And an occupant may just as readily react violently from seeing that a person has removed and reached beyond an unaffixed window screen as an affixed window screen. (See *ibid*.) Rather than staying put and calling the police, as Torres did, "a different resident might have retrieved a loaded firearm to prevent further entry." (*People v. McEntire*, *supra*, 247 Cal.App.4th at p. 493.) Because, on the facts of this case, removing and reaching past the unaffixed window screen violated the possessory and safety interests of the home's occupants, entry past the unaffixed window screen, like entry past an affixed window screen, was " 'the type of entry the burglary statute was intended to prevent.' " (See *Valencia*, *supra*, at p. 13.)

Garcia nonetheless argues that his actions at the living room window did not constitute an entry for several reasons. First, he attempts to distinguish *Valencia* and *McEntire* because, unlike in the instant matter, the screens in those cases were attached to, and were permanent fixtures of, the buildings. In *McEntire*, the court described the open screen as "a permanent

part of the dwelling." (*People v. McEntire*, *supra*, 247 Cal.App.4th at p. 493.) In *Valencia*, the court described the window screens as "secured in their tracks." (*Valencia*, *supra*, 28 Cal.4th at p. 4.)

But on the facts of this case, the circumstance that the screen was not secured in its track is of no moment for the reasons we have set forth. Garcia's argument that the area penetrated must be a "permanent part of a dwelling," rather than a "make-shift arrangement," is inconsistent with the holdings of *Valencia* and *McEntire*. The defendant in *Valencia* removed two window screens. (*Valencia*, *supra*, 28 Cal.4th at p. 4.) And the screen door in *McEntire* was ultimately found off its track. (*People v. McEntire*, *supra*, 247 Cal.App.4th at pp. 493–494.) The quick removal of the screens in these cases demonstrates their impermanence as structural features. Unlike a wall, a roof, or a window itself, the residents in both cases could have easily removed the screens at any time. The screens were not "permanent" in the sense that the privacy of the homes could not be enjoyed without them. Nevertheless, penetration of those screens amounted to entry under the burglary statute.

Moreover, *Valencia*'s analysis did not turn on the feature's permanence; instead, the touchstone of the "reasonable belief" test is whether the building element at issue enclosed an area into which a reasonable person would believe a member of the general public could not pass without authorization. (*Valencia*, *supra*, 28 Cal.4th at p. 11.) For example, in *People v. McEntire*, the defendant was held to have made entry even though the sliding screen was already open. We see little, if any, difference between entry behind the area that would have been covered by a

sliding screen—had it been closed—and entry behind a screen that is in place in front of the window, but not in its track.

Garcia's second contention—that the screen was not part of the outer boundary of the house because it provided no protection from intruders—fares no better. Garcia argues that, because the unaffixed window screen could be "easily moved" and "provided no significant protection of the house from entry," penetration beyond it cannot have constituted entry under the burglary statute.[3] This argument, however, is foreclosed by the *Valencia* court's refusal to "cast the reasonable belief test in terms of 'whether a reasonable person would believe' that any given element of a building 'provides some [physical] protection against unauthorized intrusions.' " (*Valencia*, *supra*, 28 Cal.4th at pp. 11–12.)[4] Courts applying *Valencia* have found the entry

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[3] Somewhat inconsistently, Garcia also argues that a "protection from invasion" test is overbroad and unworkable. Given that *Valencia* rejected the "protection from invasion" test (*Valencia*, *supra*, 28 Cal.4th at pp. 9, 11-12), we do not address this aspect of Garcia's argument.

[4] In *People v. Nible* (1988) 200 Cal.App.3d 838 (*Nible*), the court presaged *Valencia*, concluding that "penetration of a window screen but not the window itself constitutes a burglarious entry." (*Nible*, at p. 841.) *Nible* so held based on the policies underlying the burglary statute. (*Id.* at p. 844.) *Nible* also reasoned that "the focus of the question whether the penetration of a window screen constitutes a burglarious entry must be on whether a reasonable person would believe a window screen provides some protection against unauthorized intrusions" and concluded that a screen, which is a "permanent part of the dwelling," provided such protection. (*Id.* at p. 845.) *Valencia* explained that *Nible*'s analysis must be understood not to refer to

requirement satisfied even when the structural element penetrated provided little to no protection from intrusion at the time of entry. For example, as noted, in *People v. McEntire*, the court held that the defendant had entered the home when he reached his hand beyond an open screen door and began pulling on the sliding glass door. (*People v. McEntire*, *supra*, 247 Cal.App.4th at pp. 492–493.) And *People v. Thorn* held that the defendant entered a building when he walked into the three-sided carport, even though it provided no physical barrier or protection from entry. (*People v. Thorn*, *supra*, 176 Cal.App.4th at p. 265.)

Third, Garcia argues that the accessibility of the area underneath the living room window, and the occasional presence of others there, would have made a reasonable person uncertain whether the general public needed authorization to pass beyond the window screen. Garcia points out that a gardener left items just underneath the air conditioner unit, and the mailman delivered letters to a mailbox within arm's reach of the living room window. But, the fact that Torres's gardener and her postal carrier had access to the area near or beneath the window is not significant. Both the gardener and the postal carrier were authorized to be in the area, and no evidence suggested either was authorized to, or did, penetrate the space behind the window screen. Neither the accessibility of Torres's yard nor the

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the physical protection a screen provides; rather, the "test properly is phrased in terms of whether a reasonable person would believe that the element of the building in question enclosed an area into which a member of the general public could not pass without authorization." (*Valencia*, *supra*, 28 Cal.4th at pp. 11–12.)

proximity of workers whose presence was authorized would suggest a blanket permission to remove and pass beyond the unaffixed screen, and thus these facts do not undermine an unaffixed window screen's "announce[ment] that intrusion is unauthorized." (*Valencia*, *supra*, 28 Cal.4th at p. 12.)

Garcia further urges that the entry element can be satisfied only when a defendant enters "the living space of a residence." He relies for this proposition on the *Valencia* dissent, which he contends sets forth a "more reasonable and workable test for what constitutes" entry. But Garcia's proposed test was expressly rejected by the *Valencia* majority, which stated: "All that is needed is entry 'inside the premises' [citation], not entry inside *some inner part of* the premises." (*Valencia*, *supra*, 28 Cal.4th at p. 13, emphasis original.) "[I]t is established that a holding of the Supreme Court binds all of the lower courts in the state, including an intermediate appellate court. [Citation.] And, it needs no citation of authority to point out that a majority opinion of the Supreme Court states the law and that a dissenting opinion has no function except to express the private view of the dissenter." (*Wall v. Sonora Union High School Dist.* (1966) 240 Cal.App.2d 870, 872; *Auto Equity Sales*, *Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1337.) Nor does Garcia persuade us that upholding his conviction in this case somehow eliminates the distinction between completed and attempted burglary. Our conclusion simply effectuates the analysis set forth in *Valencia*.

Given that penetration of the area behind an unaffixed window screen can constitute entry, there was substantial evidence Garcia made entry through the living room window

screen. Torres testified that the screen had been balanced on top of the air conditioner, against the window, but the defendant removed it. She saw Garcia with his hands placed on the lower window pane, attempting to pull it up. The lower window pane sat closer to the inside of the house than did the upper window pane, leaving a roughly one and one half-inch gap between the outer edge of the window frame and the lower glass plane. In order to touch the interior, lower window pane, the defendant's hands thus had to pass beyond the point at which the unaffixed screen sat balanced on the air conditioner. Since "penetration into the area behind a window screen amounts to an entry of a building within the meaning of the burglary statute," and Garcia reached past the area where the window screen sat, Garcia entered Torres's home within the meaning of the burglary statute. (*Valencia*, *supra*, 28 Cal.4th at p. 13; see also *People v. McEntire*, *supra*, 247 Cal.App.4th at pp. 492, 494; *People v. Nible*, *supra*, 200 Cal.App.3d at pp. 842, 846.)

(ii) *The bedroom window*

We next turn to Garcia's contention that the evidence was insufficient to establish he made entry into the home through the bedroom window. As noted *ante*, under the burglary statute, "[i]t has long been settled that '[a]ny kind of entry, complete or partial, . . . will' suffice." (*Valencia*, *supra*, 28 Cal.4th at p. 13.) The entry requirement is satisfied when a tool or instrument crosses a building's outer boundary. (*See Magness v. Superior Court*, *supra*, 54 Cal.4th at p. 279 ["A person, a foot, a hand, or a tool can 'enter' a house"]; *People v. Goode*, *supra*, 243 Cal.App.4th at p. 489 [" 'For an entry to occur, a part of the body or an instrument must penetrate the outer boundary of the building' "]; *People v. Moore* (1994) 31 Cal.App.4th 489, 490, 492 [defendant

entered a home by inserting the tip of a tire iron through the front door].) Because "a window screen is clearly part of the outer boundary of a building for purposes of burglary," (*Valencia*, at p. 12), penetration of the area behind a window screen with an instrument also constitutes entry under the burglary statute.

The jury could reasonably have inferred that Garcia entered Torres's home by pushing a screwdriver past the screen in front of the bedroom window. Torres testified that she saw Garcia trying to pull the screen from the window. Torres also saw that Garcia had an object in his hand. Shortly thereafter, Officer Mohagen recovered a small screwdriver from the area where Garcia threw something. Subsequent examination revealed a small, curved gap between the screen and the edge of the window frame; additionally, the center portion of the screen was slightly bowed out, toward the exterior of the house. Torres had checked the screens every week but had not seen this opening or damage to the screen. From this evidence, the jury could reasonably deduce that the damage to the screen occurred when Garcia inserted the screwdriver between the screen and the frame and pulled it back in his direction in an effort to pry it from the window. It was a reasonable inference that the screen could not have been slightly bent outward, as shown in one of the exhibits, unless the screwdriver had penetrated into the area behind the screen. There is thus substantial evidence that Garcia "penetrat[ed] into the area behind a window screen" and entered Torres's home within the meaning of the burglary statute. (*Valencia*, *supra*, 28 Cal.4th at pp. 12–13.)

Garcia's arguments to the contrary are unavailing. Garcia argues that "there was no testimony or photographic evidence that appellant pushed or pried an instrument past the screen."

To the contrary, as discussed, from the photographs admitted at trial, the jury could reasonably infer Garcia penetrated behind the screen with the screwdriver. Garcia also suggests that we discount Torres's testimony, because she did not see Garcia from a clear vantage point, and overlook the photographs of the window screen because "any mark or bend . . . was very faint." But in these arguments, Garcia urges us to ignore reasonable inferences the jury could have drawn from the evidence. This is not the function of an appellate court. We do not " 'reweigh the evidence, resolve conflicts in the evidence, draw inferences contrary to the verdict, or reevaluate the credibility of witnesses. [Citation.]' " (*People v. Orloff* (2016) 2 Cal.App.5th 947, 952; *People v. Reed* (2018) 4 Cal.5th 989, 1006–1007.) " 'An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.' " (*People v. Zaun* (2016) 245 Cal.App.4th 1171, 1174.) In line with these principles, we conclude the evidence was sufficient to prove Garcia's screwdriver passed beyond the screen. (See, e.g., *People v. Goode*, *supra*, 243 Cal.App.4th at pp. 490–491 [reasonable inferences from the evidence sufficed to establish that the defendant penetrated the area behind a storm door, despite the absence of physical evidence or direct testimony on the point].)

c. *The evidence was sufficient to establish Garcia entered with the requisite intent*

Garcia next argues that the evidence of intent was insufficient to sustain a first-degree burglary conviction.

A person is guilty of burglary only if he enters a house with the intent to commit a theft or felony within. (§ 459; *People v. Anderson* (2009) 47 Cal.4th 92, 101; *People v. Zaun*, *supra*, 245 Cal.App.4th at p. 1174; *People v. Mejia* (2012) 211 Cal.App.4th

586, 605.) "In order to constitute burglary, the defendant must intend to commit the theft or felony at the time of entry. [Citation.] However, the existence of the requisite intent is rarely shown by direct proof, but may be inferred from [the] facts and circumstances." (*In re Matthew A.*, *supra*, 165 Cal.App.4th at pp. 540–541; *In re Leanna W.* (2004) 120 Cal.App.4th 735, 741; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1245 ["Because intent is rarely susceptible of direct proof, it may be inferred from all the facts and circumstances disclosed by the evidence"].)

A jury could reasonably infer from the circumstances that Garcia intended to commit a theft or felony inside Torres's residence. First, the manner of Garcia's entry suggests an illicit purpose. Garcia did not ring the doorbell, knock on the door, or do anything that suggested a lawful purpose for entry. Rather, Garcia made three attempts to reach the interior of Torres's home without her permission. He removed the window screen outside of Torres's living room window and attempted to open the window. He then moved to the front door, where he tugged at the doorknob so forcefully that he shook the door. When that failed, he moved to the bedroom window and tried to pry the screen off with the screwdriver. Garcia's persistent attempts to enter Torres's home without her permission suggest he wished to do something inside the residence that Torres would not have permitted. (See *People v. Frye* (1985) 166 Cal.App.3d 941, 947 [inferring intent to steal from, among other circumstances, the fact that the defendant's entry was unauthorized].) Indeed, "burglarious intent can reasonably be inferred from an unsuccessful entry alone." (*People v. Martin* (1969) 275 Cal.App.2d 334, 339; *People v. Osegueda* (1984) 163 Cal.App.3d Supp. 25, 29–30 [a " 'felonious intent to commit theft may be

inferred from the unlawful entry alone' "].) No evidence suggested an innocent or different explanation for Garcia's conduct. (See *People v. Jordan* (1962) 204 Cal.App.2d 782, 786—787 ["the fact that the building was entered through a window . . . without reasonable explanation of the entry, will warrant the conclusion by a jury that the entry was made with the intention to commit theft"]; *People v. Martin*, at p. 339 [finding sufficient evidence of intent to steal or commit a felony where the circumstances were without reasonable explanation].)

Further, Garcia was in possession of a screwdriver, which is commonly used as a burglary tool. (See § 466 [listing screwdrivers as burglary tools]; *People v. Frye*, *supra*, 166 Cal.App.3d at p. 947 [inferring intent to steal from, among other circumstances, defendant's possession of flashlight and knife, tools with "purposes consistent with entering a . . . home to steal"]; *People v. Walters* (1967) 249 Cal.App.2d 547, 550—551 [intent to steal inferable from defendants' possession of a crowbar, pliers, and a screwdriver].) Garcia discarded the screwdriver when a police officer arrived, indicating he feared apprehension because he was aware of his own unlawful purpose. And, the evidence showed Torres's television could be seen through the front window, allowing for the inference that Garcia saw it and entered Torres's house with the intent to steal it.

Garcia's citations to *People v. Zaun*, *supra*, 245 Cal.App.4th 1171 and *People v. Weddington* (2016) 246 Cal.App.4th 468, are unavailing. He argues that those cases—in which the evidence showed the defendants engaged in coordinated schemes to commit multiple burglaries or attempted burglaries—"are instructive as to what constitutes sufficient proof of intent for burglary." But neither *Zaun* nor *Weddington* purported to set

forth a minimum quantum of evidence necessary to prove intent. That more, different, or stronger evidence may have been present in other cases does not establish the evidence was insufficient here; each case must be considered on its own facts. (See *People v. Solis* (2001) 90 Cal.App.4th 1002, 1010.)

In sum, the evidence was sufficient to prove both the entry and intent elements of the burglary.

2. *Failure to strike or impose two of the section 667.5 enhancements*

The jury found Garcia had served seven prior prison terms within the meaning of section 667.5, subdivision (b). At sentencing, the trial court stated that the "appropriate term is high term of six years plus four years plus four to five prison priors a total of ten years." It then imposed four one-year section 667.5, subdivision (b) enhancements and struck one of the remaining three enhancements. As far as the record reflects, the court failed to either impose or strike the two remaining section 667.5, subdivision (b) enhancements. Although neither party raises the issue, this error resulted in an unauthorized sentence.

Enhancements for section 667.5, subdivision (b) prison priors must be either imposed consecutively or stricken. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241 [once a section 667.5, subdivision (b) enhancement is found true, the enhancement is mandatory unless stricken]; *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1561.) The failure to impose or strike an enhancement results in a legally unauthorized sentence subject to correction for the first time on appeal. (*People v. Vizcarra* (2015) 236 Cal.App.4th 422, 432; *People v. Bradley* (1998) 64 Cal.App.4th 386, 391.) Where a trial court does not strike or impose the enhancement, the reviewing court should remand to

allow the trial court to do so. (See *People v. Chavez* (2012) 205 Cal.App.4th 1274, 1276; *People v. Bradley*, at pp. 391–392.) Accordingly, we remand the matter to allow the trial court to exercise its discretion to strike or impose the two remaining prior prison term enhancements.

DISPOSITION

The matter is remanded to allow the trial court to exercise its discretion to strike or impose the two remaining section 667.5, subdivision (b) prior prison term enhancements. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA. J.